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No.80-1595

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

UNITED STATES OF AMERICA,

Petitioner,

v.

JOSEPH C. FRADY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT

DANIEL M. SCHEMBER
Gaffney, Anspach, Shember,
Klimaski & Marks, P.C.
Attorneys at Law
1712 N Streets, N.W.
Washington, D.C. 20036
(202) 223-9274

Court-appointed Counsel
for Respondent

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

QUESTIONS PRESENTED

I. **MUST THE DECISION OF THE COURT OF APPEALS BE AFFIRMED BECAUSE IT RESTS ON AN ADEQUATE, INDEPENDENT FOUNDATION OF LOCAL LAW WHICH THAT COURT HAD JURISDICTION TO APPLY, AND DID APPLY?**

IF NOT,

II. **CONSIDERING FEDERAL PRECEDENTS, DID THE COURT OF APPEALS PROPERLY DETERMINE TO REACH THE MERITS OF RESPONDENT'S JURY INSTRUCTION CLAIMS?**

III. **CONSIDERING FEDERAL PRECEDENTS, DO THE INSTRUCTION ERRORS IN THIS CASE WARRANT RELIEF ON COLLATERAL ATTACK?**

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JOSEPH C. FRADY,

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT

STATEMENT OF THE CASE

Respondent is a District of Columbia prisoner convicted solely of local offenses (premeditated and deliberate murder, and robbery, stemming from the same incident).[1] This is not a federal case.

[1]Respondent was released by the U.S. Court of Appeals pending final disposition of this litigation.

Petitioner states accurately the facts, findings, and procedural history, with two exceptions:[2] the unqualified assertions, "respondent and Richard Gordon murdered Thomas Bennett" and "intent was not an issue," are not warranted by the record.[3] The Court of Appeals held the instruction errors in this case created as serious question whether respondent was guilty of murder or manslaughter, and whether a miscarriage of justice occurred. *United States v. Frady*, ___ U.S.App.D.C. ___, 636 F.2d 506, 512 (1980). Furthermore, on direct appeal on judge reviewing all the pertinent facts, held the evidence of premeditation and specific intent to kill insufficient as a matter of law. *Frady v. United States*, 121 U.S.App.D.C. 78, ___, 348 F.2d 84, 97 (1965) (Wright, J., dissenting):

> [A]ppelants arrived at their victim's home unarmed. Compared with their victim, they were men of slight stature. They were admitted after knocking. Subsequently a fight developed in which the victim was killed by being struct on the head with part of a wooden table top, the table presumably having been broken in the fight. Appellants were apparently unaware the victim was dead. [Footnote omitted.] However, they took his wallet and left his apartment.

[2]A third, minor misstatement of the case is found in Petitioner's Brief at 6, n.3: "The court of appeals expressly declined to decide whether this Court's decision in *Sandstrom v. Montana*, 442 U.S. 510 (1979), was applicable in this case." On the contrary, the Court of Appeals held one jury instruction, "every man is presumed to intend the natural and probable consequences of his own act," to be "clearly erroneous" under *Sandstrom*. *United States v. Frady*, ___ U.S.App.D.C. ___, 636 F.2d 506, 509, n.7. The Court of Appeals, however, found no need to determine whether this erroneous instruction prejudiced the jury's consideration of specific intent to kill, since reversal was required due to fundamental errors in the instructions on malice. *Id.*

[3]The government, itself, placed intent in issue by charging felony murder, premised on intent to rob, simultaneously with premeditated murder, which requires intent to kill.

If this were all the evidence, it would not seriously be argued that a sufficient showing of premeditation and deliberation had been made.... Therefore the Government relies on several occurrences taking place some time before the killing. The appellants were seen driving slowly by the victim's house on the afternoon before the killing. About an hour before the killing, they drove by and one of them pointed out the house. One of the appellants picked up a glove before entering the victim's apartment on the night of the killing. Parts of a conversation in a restaurant were overheard shortly before the crime. The appellants were talking with George Bennett, a brother of the victim. One of the appellants was heard to ask Bennett "if he hit a man in the chest, could you break a rib and fracture or puncture a lung, could it kill a person," to which Bennett replied, "You have to hit a man pretty hard." As they were leaving the restaurant, Bennett said to the appellants, "If you do a good job you will get a bonus."

This evidence, while it may suggest a deliberate premeditated intent to enter the victim's home for an illegal purpose [footnote omitted], is too ambiguous to support a finding of an intent to kill. [Footnote omitted.] It is consistent with either an intent to kill or an intent to injure but not kill. Thus, in logic as well as in law, it does not necessarily provide proof of the specific intent to commit premeditated murder.[4]

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[4]The government claims the snatches of restaurant conversation constitute "overwhelming" evidence the killing was a murder for hire. Pet. Br. at 46. If that is so, why was the chief culprit—George Bennett, the man who "hired" respondent—appointed to administer the victim's estate, rather than prosecuted for murder? (Tr. 691). Furthermore, the witness who claimed she heard the restaurant conversation has now recanted her testimony, stating it was coerced. *United States v. Frady*, Cr. No. 402-63 (U.S.D.C., D.C., Statement of Points and Authorities in Support of Release, Exhibit C, filed October 2, 1980). The government acknowledges the recantation but maintains it does not specifically admit the witness perjured herself before. *Id.*, Opposition to Defendant's Motion for Release on Recognizance, filed October 27, 1980, at 5, n.2.

On this evidence the trial judge instructed the jury, first, "a wrongful act . . . intentionally done . . . is therefore done with malice," second, "every man is presumed to intend the natural and probable consequences of his own act," and, third, "the law infers or presumes from the use of . . . [a deadly] weapon in the absence of explanatory or mitigating circumstances the existence of . . . malice."[5] J.A. 27-28.

On collateral attack the government conceded the first and third instructions above were erroneous. *Frady, supra,* ____ U.S.App.D.C. ____, 636 F.2d 508, N. 5. The Court of Appeals held these instructions required the jury to find malice merely upon finding either a wrongful act intentionally done or unexplained use of a deadly instrument. The instructions therefore had the effect of "foreclosing the jury from considering the alternative of manslaughter," which is distinguished from murder by the absence of malice, and was a lesser included offense the trial judge held reasonably raised by the evidence. *Id.*, at 511-512.

The Court of Appeals also held the second instruction above "clearly erroneous" under *Sandstrom v. Montana*, 442 U.S. 510 (1979); but, given the necessity of reversal on the malice issue, the court found no need to determine whether the jury's consideration of specific intent to kill was prejudiced by this error. *Frady, supra,* ____ U.S.App.D.C. ____ 636 F.2d 509, n. 7.

In this Court the government claims respondent waived the instruction errors by failing to object at trial or to raise them on direct appeal. The government argues relief from this alleged waiver required demonstration of "cause" not

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[5]Moments before, the trial judge had instructed that a similar inference or presumption from use of a weapon did not apply to specific intent to kill. J.A. 27.

only for failure to object but also for failure to appeal. The government claims no cause was shown and that, given the "overwhelming" evidence, respondent was not prejudiced by the multiply-erroneous jury instructions.

SUMMARY OF ARGUMENT

I

This is a local, D.C. murder case in federal court due only to the residual effects of statutory provisions now repealed. The Court of Appeals, exercising its Article I jurisdiction, was obligated to apply local law, and did so. Local law imposes no waiver or forfeiture of trial errors for failure to object or to appeal. Local law also warrants relief on the merits in this case, and, therefore, the decision of the Court of Appeals rests on an adequate, independent foundation of local law and must be affirmed.

II

Federal case law also holds that the issues in this case properly may be reached on the merits. No express, federal waiver provision applies to these claims, as the government concedes. This Court's precedents governing collateral attack, moreover, consistently reach the merits of non-federal prisoner claims, where waiver or forfeiture of the claims is not imposed by local law. District of Columbia law imposes no waiver or forfeiture.

In *Henderson v. Kibbe*, 431 U.S. 145 (1977), this Court on collateral attack reached the merits of a jury instruction claim held waived by the highest state court. This precedent

should be followed, as instruction errors, unlike pretrial errors, directly impact the jury's truth-finding function. Ensuring the reliability and integrity of the process which determines guilt or innocence is the central function of the federal Great Writ, and in proper cases the interest in a fair trial must prevail over state or local procedural rules.

III

The government concedes the instructions on malice given respondent's jury were erroneous. Three instructions given at respondent's trial were constitutionally defective under retroactively applied holdings of this Court. These errors call into question the jury verdict on respondent's state of mind. Judges examining the record in this case have noted strong doubts about the evidence of premeditation, deliberation, intent to kill, and malice. The prejudice of the multiple errors therefore warrants relief in this case, since respondent has already served the maximum sentence for manslaughter and his liability for any greater offense is now uncertain.

ARGUMENT

I

THE U.S. COURT OF APPEALS, PURSUANT TO ITS UNIQUE ARTICLE I JURISDICTION TO DECIDE QUESTIONS OF LOCAL LAW IN CERTAIN CASES CONCERNING SOLELY LOCAL CRIMES, PROPERLY REACHED AND DECIDED THE MERITS OF RESPONDENT'S CLAIMS.

Respondent's trial took place prior to the District of Columbia Court Reform and Criminal Procedure Act of 1970, 84 Stat 473, at a time when the United States District Court for the District of Columbia had exclusive jurisdiction over local felonies and was, thus, "filling the role of both a local and federal court." *Palmore v. United States*, 411 U.S. 389, 392, n.2 (1973). At that time the U.S. Court of Appeals for the District of Columbia Circuit had appellate jurisdiction to review decisions of not only the District Court, but also the local appellate court; and in exercise of that appellate jurisdiction the U.S. Court of Appeals issued binding decisions on questions of purely local law. *Id.* All such decisions issued prior to February 1, 1971 are still binding on local D.C. courts unless expressly overruled by the District of Columbia Court of Appeals. *Berryman v. United States*, 378 A.2d 1317 (D.C.App. 1977).

The Court Reform Act transferred general jurisdiction over local felonies to a new local court system,[6] but under 28 U.S.C. §2255 the District Court retains jurisdiction to consider postconviction motions from prisoners it has sentenced, even if they were convicted of local crimes and raise only local claims.[7] Thus, when a local prisoner,

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[6]An exception, however, retains District Court jurisdiction to try local crimes when they are joined in an indictment also charging a federal offense. D.C. Code §11-502(3)(1973). *See Palmore*, supra at 392, n.2. Even in the post-Court Reform Act era, this exception has resulted in the federal court both sentencing defendants convicted solely of local offenses and considering subsequent postconviction motions from the. *United States v. Garnett*, ____ U.S.App.D.C. , 653 F.2d 558 (1981).

[7]Section 2255 is available to a prisoner "in custody under sentence of a court established by Act of Congress" and the statute requires the prisoner to seek relief in the sentencing court. Where a D.C. prisoner's motion raises only meritorious claims under D.C. law, the prisoner's conviction fits the category of those "otherwise subject to collateral attack."

convicted in federal court of a local crime, is entitled to release under local law, the District Court must afford this relief. Failure to do so would discriminate against some D.C. prisoners solely on the basis of the court in which they were tried, and pose a serious equal protection question. *United States v. Brown*, 157 U.S.App.D.C. 311, 483 F.2d 1314 (1973); *United States v. Thompson*, 147 U.S.App.D.C. 1, 452 F.2d 1333 (1971).

Under these principles, the relief afforded respondent by the U.S. Court of Appeals is fully warranted. First, under D.C. law failure to object to trial errors is not a waiver or forfeiture precluding either appellate or collateral review. The local courts reach the merits in such cases. *Towles v. United States*, 428 A.2d 836 (D.C.App. 1981) (direct appeal); *Bundy v. United States*, 422 A.2d 165 (D.C.App. 1980) (direct appeal); *Hargett v. United States*, 380 A.2d 1005 (D.C. App. 1977) (collateral attack); *Butler v. United States*, 388 A.2d 883 (D.C. App. 1978) (collateral attack); *Atkinson v. United States*, 366 A.2d 450 (D.C. App. 1976) (collateral attack); *Watts v. United States*, 362 A.2d 706 (D.C. App. 1976) (direct appeal). Furthermore, prior to February, 1971, the U.S. Court of Appeals determined in a case involving a District prisoner that issues not raised on appeal were cognizable on collateral attack. *Tucker v. United States*, 138 U.S.App.D.C. 345, 427 F.2d 615 (1970) (constitutional issues).[8] *Tucker* remains a valid local precedent.

Second, under D.C. law the standards of review on direct appeal and collateral attack for issues not raised at trial are substantively identical. The ultimate inquiry in either case

[8] In *Hargett*, *supra* at 1008, the local appellate court stated collateral attack is not limited to constitutional issues. The issues reached on the merits in *Butler*, *supra*, moreover, were nonconstitutional.

concerns the probability that a miscarriage of justice has occurred. In *Bundy*, *supra* at 767-768, the local appellate court stated on direct appeal:

> [B]ecause appellant did not object . . . at trial, our review is limited to the question whether the error committed rose to the level of plain error. . . . *Watts v. United States*, D.C.App., 362 A.2d 706 (1976) (en banc). Under the plain error standard, the error complained of must be so clearly prejudicial to subtantial rights as to jeopardize the very fairness and integrity of the trial. *Watts v. United States*, *supra*. In this endeavor we look to all the circumstances of the case to determine whether there is a probability that there has been a miscarriage of justice. *Lloyd v. United States*, D.C.App., 333 A.2d 387 (1975).

In *Butler*, *supra* at 886, where the claim had not been raised in the trial proceeding or on direct appeal, the court on collateral attack reached the merits to determine whether "a fundamental error and resultant miscarriage of justice" was present. In *Atkinson*, *supra* at 452, the court noted that under "exceptional circumstances" collateral review extends to "serious defects in the trial" [quoting *United States v. McCord*, 166 U.S.App.D.C. 1, 8, 509 F.2d 334, 341 (1974)]; and in *Hargett*, *supra* at 1008, the court defined "exceptional circumstances" as cases "which involve the denial of a basic right, . . . not . . . limited to constitutional rights." Of significance, *McCord*, *supra*, 166 U.S.App.D.C. ____, 509 F.2d 339-342, nn. 10-13, favorably cited by the local appellate court in *Atkinson*, noted the similarity between plain error review and review on collateral attack.[9].

[9] Local law setting the standards for withdrawal of guilty pleas also supports this point. Under local rules of criminal procedure, a motion to withdraw a guilty plea must be made prior to sentencing. Failure to meet this deadline does not forfeit the right to relief; but, under the rules, a late motion changes the standard of review to "manifest injustice." The same standard is applied by the local D.C. Court of Appeals when a guilty plea is challenged on collateral attack, rather than by delayed motion in the original proceeding. *Lorimer v. United States*, 425 A.2d 1306 (D.C. App. 1981).

Third, under D.C. law two jury instructions on malice identical to those given at respondent's trial have been held erroneous and sufficiently prejudicial to warrant relief despite absence of timely objection. *United States v. Wharton*, 139 U.S.App.D.C. 293, 433 F.2d 451 (1970); *Green v. United States*, 132 U.S.App.D.C. 98, 405 F.2d 1368 (1968). As the government concedes, Pet. Br. at 42, n.35, these holdings have a foundation in local law. Moreover, since *Wharton* and *Green* involved only local, D.C. crimes and were decided prior to February 1, 1971, they are today binding local precedents.

In reviewing respondent's case, the U.S. Court of Appeals was obliged to consider these precedents and determine whether the prejudice of the two erroneous instructions was sufficient to warrant relief on collateral attack. *Brown, supra*; *Thompson, supra*. This judgmental assessment of "the over-all factual situation[]," *Green, supra*, 132 U.S. App.D.C. ____, 405 F.2d 1369, involving locally-developed judicial standards in local criminal case—made by the U.S. Court of Appeals in exercise of unique Article I jurisdiction—is precisely the kind of judgment which this Court has left to the discretion of that lower court:

> Matters relating to law enforcement in the District are entrusted to the courts of the District. Our policy is not to interfere with the local rules of law which they fashion, save in exceptional situations where egregious error has been committed.
>
> Where the choice of the [United States] Court of Appeals of the District of Columbia in local matters between conflicting legal conclusions seems nicely balanced, we do not interfere.

Fisher v. United States, 328 U.S. 463, 476 (1946).

Judges examining this case have sharply divided over the evidence of respondent's state of mind and, hence, over the significance of the erroneous malice instructions given at trial. One judge on direct appeal held the evidence of

premeditation and specific intent to kill, viewed in the light most favorable to the government, insufficient as a matter of law. *Frady v. United States*, 121 U.S.App.D.C. 78, ____, 348 F.2d 84, 97 (1965) (Wright, J., dissenting). Other members of the court disagreed.

On collateral attack the Court of Appeals held the erroneous malice instructions required reversal because (1) as the trial judge found,[10] "the evidence in the record warranted a jury instruction on manslaughter," which is distinguished from murder by the element of malice; (2) "the evidence of malice was equivocal" respondent "did not enter the victim's house armed; he killed the victim with a weapon of chance—a piece of furniture"; and (3) the erroneous jury instructions "foreclos[ed] the jury from considering the alternative of manslaughter"; consequently, respondent was "denied a substantial right." *United States v. Frady*, ____ U.S.App.D.C. ____, 636 F.2d 506, 511-512 (1980). The Court of Appeals concluded that a "clear miscarriage of justice has occurred if appellant was guilty of manslaughter but is now serving the penalty for murder." *Id.* at 512.

On motion for rehearing *en banc* a majority of the court chose not to question these judgments, while four judges disagreed, stressing their own assessment of the facts. *Id.* at 514.

Such differences, however, are not for this Court to resolve. *Fisher, supra*. Moreover, the standards applied by the Court of Appeals in this case comport with D.C. law, which the court had jurisdiction, and an obligation, to apply.

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[10]It is the practice of this Court not to disturb a finding of this kind made by both the District Court and the Court of Appeals. *Pick Mfg. Co. v. General Motors Corp.*, 299 U.S. 3 (1936).

The principal authorities invoked by the Court of Appeals to set aside respondent's conviction, *Green* and *Wharton*, *supra*, are valid local precedents. The decision of the Court of Appeals, therefore, rests on an adequate, independent foundation of local law and must be affirmed.

II

UNDER FEDERAL PRECENDENTS, THE COURT OF APPEALS PROPERLY REACHED THE MERITS OF RESPONDENT'S JURY INSTRUCTION CLAIMS

The thrust of the government's argument in this case is that respondent waived or forfeited his right to challenge the erroneous jury instructions because he failed to object at trial and failed to raise the issue on direct appeal; therefore, respondent cannot reach the merits of his claims unless he demonstrates "cause" for both of these procedural failings. *Wainwright v. Sykes*, 433 U.S. 72 (1977); *Francis v. Henderson*, 425 U.S. 536 (1976); *Davis v. United States*, 411 U.S. 233 (1973). These authorities, however, do not support the government's position.

Davis involved a federal rule of criminal procedure which expressly applied to the type of claim there raised, expressly deemed the claim waived on direct appeal unless presented pretrial, and afforded relief from the waiver only for "cause." The Court held the "cause" requirement had to be met when the claim was first raised on collateral attack, for to hold otherwise would "perversely negate the Rule's purpose." *Id.* at 242. The Court, at 239, distinguished *Kaufman v. United States*, 394 U.S. 217 (1969), where the Court had reached the merits despite the petitioner's procedural default, on the

ground that "the Court in *Kaufman* was not dealing with the sort of express waiver provision" involved in *Davis*.

Rule 30, Federal Rules of Criminal Procedure, applicable here, is not an "express waiver provision." Failure at trial to object to erroneous instructions does not waive or forfeit the right to relief, it merely changes the standard of review to plain error. Rule 52(b), Fed. R. Crim Pro.; *Namet v. United States*, 373 U.S. 179 (1963).

The government concedes as much, Pet. Br. at 18, but argues that on collateral attack the result should be different. The government suggests two reasons: first, "cause" must be shown for failure to appeal, Pet. Br. at 24, in 19; and second, "the substantial policies furthered by generally enforcing contemporaneous objection rules" have resulted in the "cause" standard being "incorporated directly into the body of law governing the availability of federal habeas corpus review." *Id.* at 21.[11]

The first reason is easily rejected. Accepting it would require this Court to overrule *Kaufman* and *Fay v. Noia*, 373 U.S. 391 (1963). The government urges no such result: furthermore, this Court has reaffirmed the holding of those cases that mere failure to appeal does not waive the right to seek collateral relief. *Humphrey v. Cady*, 405 U.S. 504 (1972). *See Henderson v. Kibbe*, 431 U.S. 145, 157 (1977) (Burger, C.J., concurring).

The second reason is also without merit. The government relies on *Sykes* and *Francis*; but, unlike the Court in those cases, the government overlooks that failure to object at trial does not bar federal habeas relief unless state law deems the claims waived or forfeited. In both these cases the state courts held the claims forfeited, absolutely. In *Francis* the

[11]The last phrase quoted is from *Sykes*, *supra* at 85.

Court, at 542, n.5, recognized that a different result would have been reached had the state courts decided the merits. in *Hankerson v. North Carolina*, 432 U.S. 233, 244, n.8 (1977), this Court again stated that forfeiture of jury instruction errors on collateral attack was a question for states to resolve: "The States, if they wish, may . . . insulate past convictions by enforcing the . . . rule that failure to object to a jury instruction is a waiver of any claim of error."[12]

In the instant case, the Court of Appeals, properly exercising its Article I jurisdiction, determined that the District of Columbia is not a jurisdiction that wishes to so insulate past convictions. Local precedent supports this determination, which this Court should not disturb. *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1976); *Fisher, supra*; Argument I, *supra*.

The Balance of policy considerations also supports this determination and commends a similar result even if no deference is given to the District of Columbia's wishes. Since in cases such as respondent's the error is apparent in the original trial record, grant of habeas relief does not depend on factual determinations made long after the

[12]*But see Henderson v. Kibbe, supra*, where seven members of the Court, on collateral attack, reached the merits of a state prisoner's jury instruction claim, though the highest state court had held the claim waived. Respondent respectfully submits that the Court's approach in *Kibbe* was correct, footnote 8 of *Hankerson notwithstanding. Constitutional errors prejudicial to jury deliberations, and calling into question validity of jury verdicts, are the central concern of the federal writ of habeas corpus. Stone v. Powell*, 428 U.S. 465 (1976). Many jury instruction errors fall in that category, and federal enforcement of state rules deeming such errors forfeited would seriously erode the Great Writ. Claims such as those in *Stone v. Powell, Sykes*, and *Francis* are more distant from this central concern. Yet even in *Francis* and *Sykes* the Court was unwilling to hold the claims absolutely waived, despite the state court holdings on the question.

original trial. Moreover, the balance between the sovereign's interest in orderly trial procedure and the criminal defendant's interest in a fair trial is already reflected in Rule 52(b).[13] Where, as here, the petitioner's failure to object or to raise his meritorious claim earlier cannot be attributed to a deliberate attempt to inject error into the proceedings, the interests that remain to be balanced are the sovereign's desire to avoid delayed retrial and the petitioner's interest in fair determination of guilt or innocence.

In the present case, the government has available the original trial transcript and can use it to supply any testimony no longer available. If the evidence against respondent is as "overwhelming" as the government maintains, retrial should cause the prosecutor little concern. Moreover, this is not a case where grant of habeas relief will result in an unwarranted "windfall" to respondent. He has already served the maximum penalty for manslaughter. At stake on retrial is nothing more than that made questionable by the erroneous instructions on malice—is respondent guilty of manslaughter or murder? Those considerations fully warrant affirmance of the Court of Appeals' decision to reach the merits of this case.

III

UNDER FEDERAL PRECEDENTS, THE COURT OF APPEALS PROPERLY GRANTED RELIEF ON THE MERITS.

The Court of Appeals relied on local precedents, the *Green* and *Wharton* decisions, but there can be no serious

[13]To adopt a stricter standard on collateral attack, solely to serve the interest of orderly *trial* procedure, would "preversely negate the rule's purpose." *Davis*, *supra* at 242.

dispute that the instructions challenged in this case are also constitutionally defective under this Court's decisions in *Mullaney*, *Sandstrom*, and *In Re Winship*, 397 U.S. 358 (1970). The instruction presuming malice from unexplained use of a deadly instrument effectively relieved the government of its burden of proving malice beyond a reasonable doubt. The instruction equating malice with an intentional wrongful act had the same effect, particularly when combined with the instruction that the requisite intent "is presumed" if the wrongful act is a "natural and probable" consequence of whatever one does.

Petitioner raises no opposition to these points; the government's position on the merits is that the multiple instruction errors do not warrant relief on collateral attack.

First, the government hypothesizes the "likely" perceptions of "the ordinary juror" regarding the offending instructions and offers its view that "it seems unlikely" that such a juror "would have understood the judge" to mean what he said. Pet. Br. at 43. Respondent respectfully submits this analysis invades the province of the jury and is no basis for reversing the Court of Appeals. The government also claims, however, that the erroneous instructions were cured by the standard instructions on presumption of innocence, the prosecution's general burden of proof, and the jurors' duty to consider the testimony of all the witnesses. This Court rejected an identical contention in *Sandstrom*, *supra* at 518, n.7. The Court of Appeals expressly followed *Sandstrom* on

this point. *Frady, supra,* ___ U.S.App.D.C. ___, 636 F.2d 512, n.15.[14]

Second, the government takes issue with the Court of Appeals' comparison of the facts in this case with those in other local precedents—*Green*; *Wharton*; *Howard v. United States*, 128 U.S.App.D.C. 336, 389 F.2d 287 (1967); *Belton v. United States*, 127 U.S.App.D.C. 201, 382 F.2d 150 (1967). This is not a proper dispute for this Court to address; nonetheless the position of the court of Appeals is entirely correct.

In *Belton* the appellant went unarmed to the home of his former lover, entered the house, exchanged a few words and fired six shots into her as she lay on a bed. The court held the evidence did not reasonably raise the lesser included offense of manslaughter and since the only instruction error concerned malice, the court held the prejudice insufficient to warrant relief under the plain error standard. In the instant case, respondent went to victim's house unarmed, a fight ensued between him, his companion, and the much larger victim, the trial judge held manslaughter reasonably raised by the evidence, and three erroneous instructions eliminating the government's burden to prove malice were given.

In *Howard* the victim was a seven-year-old girl whose throat was slashed by an adult male intruder when she called for help. The court held that the proof of malice was not equivocal and that the lone instructional error on malice did

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[14]Finally in this regard, the government claims, Pet. Br. at 43, that since the trial judge instructed the jurors they were not required to presume *intent to kill* from use of a weapon, this cured the erroneous instruction that the law presumes *malice* from use of a weapon. Respondent respectfully submits that a proper instruction on one element of an offense cannot cure an improper instruction on a different element.

not warrant reversal under the plain error standard. The constrasting facts in *Frady* clearly distinguish *Howard.*

The government argues that in *Green* and *Wharton* self-defense was raised; therefore relief was warranted in those cases but not in *Frady*. But claiming self-defense is merely one way of placing malice in issue. The trial judge and the Court of Appeals in this case both were of the view that manslaughter was fairly raised by the prosecution's evidence. This determination indicates malice was in issue, just as it was in *Green* and *Wharton*, though for different reasons.

Finally, the government disagrees with the Court of Appeals' determination that the malice evidence was "equivocal" and asserts it was "overwhelming." The government adds that the instruction errors were irrelevant to the defense theory of a third man, the real killer. The irrelevance of the errors to the third man defense, however, does not make the errors any less relevant to the government's case, nor does it reduce the government's burden of proof of malice.

Moreover, as noted earlier, the proper characterization of the malice evidence is not the issue in this case. Respondent's conviction must be set aside because the errors were of a kind affecting the jury deliberations on the basic question of guilt or innocence. Judges reviewing the record have expressed grave doubts about the evidence on every aspect of respondent's state of mind. The proof of premeditation, deliberation, intent to kill, and malice has been questioned. Multiple, serious errors occurred in the instructions on malice and respondent is therefore entitled to a new, fair determination of this issue.

CONCLUSION

The decision of the Court of Appeals should be affirmed.

Respectfully submitted,

DANIEL M. SCHEMBER
Gaffney, Anspach, Schember,
Klimaski & Marks, P.C.
1712 N Street, N.W.
Washington, D.C. 20036
(202) 223-9274

Court-appointed Counsel
for Respondent